APPENDIX A.

INTERSTATE COMMERCE COMMISSION

No. 29592

PROPOSED POOLING OF RAILROAD EARNINGS INVOLVED IN OPERATION OF THE PULLMAN COMPANY UNDER RAILROAD OWNERSHIP.

Submitted Decided

Upon application of certain class I railroads for approval of a proposed pooling of earnings involved in operation of sleeping car service by The Pullman Company under railroad ownership, *Found*: (1) That all applicants have assented to the proposed pooling; (2) That the proposed pooling will be in the interest of better service to the public and of economy in operation; (3) That the proposed pooling will not restrain competition; and (4) That the consideration for the proposed pooling wil be just and reasonable. Proposed pooling authorized and approved.

Jacob Aronson, John Dickinson, Emmett E. McInnis, Sydney R. Prince, Albert Ward, C. Raymond Hulsart, and *Henry L. Walker* for applicants.

George B. Haddock, Samuel Karp, James R. Browning, Robert J. Bulkley, Frank J. Meistrell, Herbert G. Pillen, and *Arne C. Wiprud,* for interveners.

REPORT PROPOSED BY HOWARD HOSMER AND O. G. BARBER, EXAMINERS.

By application, filed July 25, 1946, as amended, 56 class-I railroads seek approval under section 5(1) of the Interstate Commerce Act of a plan for pooling or division of traffic, or of service, or of gross or net earnings or of any portion provided for in certain existing and proposed agreements relating to railroad sleeping-car service. The applicants are listed in Appendix A, in which appear also the names of The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and The New York, Chicago and St. Louis Railroad Company. These three carriers are opposed to the application, but they wish to become parties to the plan proposed by the applicants if it is approved.

Petitions of intervention in opposition to the application were tendered at the hearing by the three opposing rail carriers above named, the Department of Justice, and Otis & Co., a Delaware corporation engaged in investment banking at Cleveland, Ohio. Otis & Co. says that it "is not an intervener in this proceeding in the usual sense," and it presented no testimony.

This application is an outgrowth of a suit brought by the Department of Justice in the District Court of the United States for the Eastern District of Pennsylvania[1] against The Pullman Company, (hereinafter referred to as Pullman) the sole sleeping-car company which is subject to the Interstate Commerce Act, Pullman-Standard Car Manufacturing (hereinafter referred to as Pullman-Standard), which manufactures sleeping and other railroad cars, and Pullman Incorporated, a holding company, which owns all the capital stock of the other two companies, for violation of the Sherman Antitrust Act. The District Court found that the defendants had violated that act and ordered them to separate completely the ownership and operation of

[1] This court, which for the case referred to consisted of three circuit judges, is subsequently referred to as the District Court.

sleeping cars from the manufacture of such cars, *United States* v. *Pullman Co.*, 50 F. Supp. 123, 53 id. 908. Pullman Incorporated was given the right to elect which business it would dispose of. After hearing the District Court on March 22, 1945, entered an order permitting Pullman Incorporated to cause Pullman to treat with interested railroads or any other persons for the sale of the sleeping-car business and the properties connected therewith or for the sale of the stock of Pullman. (55 F. Supp. 985). About two months later Pullman Incorporated made an offer to a buying group of railroads to sell the stock of Pullman to them. Those railroads accepted that offer November 7, 1945, agreeing to pay for the stock in full in cash. After a hearing upon application for approval of the sale and the offers of other prospective purchasers, one of whom was Otis & Co., the District Court on December 18, 1945, rendered an opinion approving the sale to the railroads (64 F. Supp. 108) and a few days later entered an order providing for continued operation of sleeping-car service by Pullman under its present management until March 31, 1946. The court's order of approval of the sale was subject to certain conditions set forth in Appendix B. This order was later continued in effect pending action by the Supreme Court on an appeal from the decision of December 18, 1945.

Under applicants' plan they will pay a total of $40,202,482 for the Pullman stock, which will be distributed among them in the percentage proportions shown in the second column of Appendix A. Their respective shares of the purchase price are shown in the third column of that appendix. The details of the proposed transaction are set forth in a memorandum agreement, as amended, which is in evidence. The general purpose is stated therein as follows:

> 1. To maintain without interruption orderly sleeping car service requisite in the interest of the public and for the military establishment in the existing emergency.

2. To afford means whereby every Railroad, subject to the terms of this Memorandum Agreement, may:

(a) acquire all or any part of the sleeping cars regularly assigned to its lines;

(b) conduct its own sleeping car operation, in whole or in part, or arrange, through contract, on reasonable and non-discriminatory terms, for the conduct thereof by others;

(c) perform its own service or maintenance, or service and maintenance, of sleeping cars used in operations on its lines;

(d) procure such service or maintenance, or service and maintenance, through contract on reasonable and non-discriminatory terms with The Pullman Company under railroad ownership or with a service company constituted as hereinafter set forth.

It is applicants' intention to reduce Pullman into, or sell its properties to, a sleeping-car service corporation within a period called the interim period which would end not later than December 31, 1948.

The assent of all applicants to their proposal is evidenced by certified copies of minutes of meetings of boards of directors or transcripts of judicial records in cases of railroads undergoing reorganization. For reasons not clearly disclosed the following railroads which provide sleeping-car service did not see fit to participate in applicants' plan: The Central Railroad Company of New Jersey (trustees); Chicago & Eastern Illinois Railroad Company; Chicago, Indianapolis and Louisville Railway Company; St. Louis Southwestern Railway Company (trustee); Tennessee Central Railway Company; and Detroit and Mackinac Railroad Company. The Canadian railroads and their subsidiaries in the United States and the National Railways of Mexico were not invited to join in the plan.

The number of serviceable sleeping cars in the United

States as of October 1, 1946, was 6,728,[2] of which 4,916 were air-conditioned and 1,812 were not so improved. These figures do not include troop sleepers built during the war. Of the air-conditioned cars 618 are lightweight (constructed of metals such as aluminum or stainless steel), 3,825 are heavyweight standard sleepers, and 473 are heavyweight tourist cars. Practically all of the lightweight cars, 3,191 heavyweight standard and 442 heavyweight tourist cars are regularly assigned to individual railroads. In addition, there are 672 air-conditioned cars, mostly heavyweight standard cars, which are unassigned but are available. The serviceable non-air conditioned cars consist of 1,669 heavyweight tourist cars and 143 heavyweight standard cars. All but a few of these are unassigned.

The lightweight cars have all been purchased by the railroads to whom they are assigned for a total price of $34,697,009, based on the depreciated book values of these cars. The purchase price of $40,202,482 to be paid by applicants was arrived at by valuation of other items of property owned by Pullman, including approximately $20,200,000 for heavyweight cars, $2,500,000 in working capital to be provided, $12,500,000 for inventories of materials and supplies, and about $4,775,000 for miscellaneous property, consisting principally of repair shops at Atlanta, Ga., Buffalo, N. Y., Calumet, Ill., Richmond, Calif., St. Louis, Mo., and Wilmington, Del., and laundries at Buffalo, Chicago, Ill., Cincinnati, Ohio, Kansas City, Mo., Miami, Fla., New York, N. Y., St. Louis, Oakland, Calif., Tampa, Fla., and Washington, D. C.

In the course of the negotiations between applicants and Pullman Incorporated a complication arose because of the reluctance on the part of many railroads to acquire directly or through stock ownership the considerable number of heavyweight sleeping cars in the existing Pullman fleet in view of the likelihood that lightweight equipment will be re-

[2] The number includes 27 non-air conditioned cars regularly assigned to Mexican and Canadian railroads.

quired for the high-speed passenger trains of the future. To meet this problem a plan was devised under which Pullman would issue interest-bearing non-negotiable notes to Pullman Incorporated due not later than December 31, 1948, in a total amount equal to the present value of the heavyweight cars. The principal of these notes would be payable either by surrendering the cars themselves or in cash. Under applicants' memorandum agreement any railroad, whether an applicant or not, would be permitted to purchase any heavyweight sleeping car regularly assigned to it at a stipulated price. It appears that some of them would avail themselves of this right which has been held in abeyance pending termination of the antitrust suit. The agreement further provides that Pullman would offer to sell unassigned cars to the railroads to the extent that it had no need for such cars. Another provision requires that any railroad which purchases either lightweight or heavyweight cars from Pullman will lease such cars to that company for operation during the interim period.

As rent for the leased cars Pullman would pay to the lessor railroad annually an amount equal to the sum of (1) the depreciation on such cars at rates prescribed by the Commission taken into the accounts of the lessor plus (2) 3 percent of the depreciated cost of such cars, referred to as interest rental. So much of this interest rental as is applicable to lightweight cars would be payable in priority and preference to all other such interest rental and to all interest on the car notes secured by the heavyweight cars before referred to. (See Appendix C, Section 1 (c).)

Applicants introduced in evidence a proposed uniform operating contract which would govern the relations between Pullman and the respective carriers for which it would perform service during the interim period. Under this contract Pullman would furnish sleeping cars to the contracting carriers to the extent that it had available cars and would service such cars. A contracting railroad would have the right at any time to furnish and operate its own

cars or arrange for a third party to do so, and Pullman would be obligated to perform the remainder of the total service insofar as it had available cars.

The contract would provide that Pullman would be responsible for damage to cars from causes originating inside such cars, while the railroad would be responsible for damages due to accident or casualty originating outside the cars. Pullman would bear the cost of shop repairs, exterior yard maintenance, as well as maintenance of the interior finish, carpets, upholstery, etc., and would clean the inside of the cars and vestibules. Generally speaking, the railroad would haul and switch the cars on passenger runs as well as to and from repair shops. The railroad would provide space for airing and storing bedding, linen, and other supplies but Pullman would pay the railroad for compressed air, heat, light, and water furnished by the railroad for this purpose. The railroad would furnish at its own cost lubricating material, ice, and drinking water, heat the cars, and clean them on the outside. Pullman would furnish and maintain the lighting equipment, including electric accessories. Railroad ticket agents would sell tickets for Pullman accommodations but would act as agents of Pullman in so doing. The contract would provide in detail for apportionment of responsibility for injuries to persons or damages to property. From the standpoint of this proceeding the most important provisions of the contract are contained in Article IV, relating to revenue relations between Pullman and the railroads, which is set forth in Appendix C.

Dilatory Contentions.

Interveners devote more than half of their briefs to arguments by which they seek to persuade the Commission that it should dismiss this application without passing upon its merits. The discussion of this phase of the case centers on two questions of a legal nature: (1) Under applicants' proposal would there actually be a pooling or division of traffic, service, or earnings within the meaning of section 5

(1)? (2). Must the applicants' purchase of the capital stock of Pullman be approved by the Commission under section 5(2) of the Interstate Commerce Act which relates to acquisition of control of one carrier by another or others?

In their briefs the Department of Justice and the intervening railroads argue that there would be no pooling under applicants' proposal. In considering this question the nature of the sleeping-car business as applicants propose to conduct it must be kept in mind. Under the present arrangement the railroads, as it were, have granted a concession to an independent company to conduct a hotel business on their lines in order to make available more comfortable facilities in cars furnished by the independent company for passengers who are willing to pay for superior accommodations. The railroads now propose to take over that hotel business and operate it co-operatively or collectively. The fact that they will continue to utilize the corporate structure originally built for the independent company does not alter the essential fact that for the time being at least this will be a joint railroad enterprise. To an important and perhaps an increasing extent the cars will henceforth be owned by the individual railroads, and the relation of Pullman to these will be largely one of service. The revenue received from passengers would be collected not by the railroad performing the transportation or owning the car but by the cooperative agency, which under applicants' plan will have custody of the pooled revenues of the railroads derived from sleeping-car service. An important change from the present arrangement lies in the fact in the future each contracting railroad will have to participate in an arrangement to guarantee Pullman against operating losses. In the past some railroads have been required to assume such guarantees insofar as operations on their individual lines are concerned but others have not.

The details of the proposed pooling would be controlled by Article IV of the proposed uniform contract set forth in Appendix C. From the total gross earnings of all sleep-

ing cars operated on the lines of each contracting railroad for any year Pullman's operating expenses allocated to such railroad as hereinafter explained, together with certain interest charges, are deducted, and the balance, if any, is divided equally between Pullman and the railroad. On the other hand, if the gross earnings are less than Pullman's operating expenses allocated to that railroad, the deficiency must be paid by the railroad. The share of net earnings which the railroad would receive or the amount of the deficiency which it would have to pay, however, would not be determined directly by Pullman's operating costs incurred on the individual railroad, for its operating expenses would not and probably could not practicably be segregated to the various lines of railroad on which they accrue. Instead each railroad would pay a fraction of the total, apportioned to the principal classes of cars (lightweight, heavyweight, tourist, etc.), determined by the ratio of cars in each class operated on each individual railroad to the total number of such cars. There is thus a special agreement as to sharing the expenses which affects the distribution of profits earned by the joint enterprise as well as the guarantee of its operating expenses, and this, we believe, brings the arrangement within the oft-cited definition of pooling in the Century Dictionary:

> A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public, and distribute the profits of the business among themselves equally, or according to special agreement. In this sense, pooling is a system of reconciling conflicting interests, and of obviating ruinous competition, by which the several competing parties or companies throw their revenue into one common fund, which is then divided or distributed among the members of the pool on a basis of percentages or proportions previously agreed upon or determined by arbitration.

Where earnings from sleeping-car traffic in the case of an individual railroad are large enough to afford a surplus for

equal division between the railroad and Pullman, they would seem to constitute pooled net earnings, for the amount is determined by agreed percentages of Pullman operating expenses, and Pullman's half is available for distribution to all stockholder railroads as dividends, which, if declared, would be payable without regard to the profitability of the sleeping-car business on the line of any particular recipient of the dividends. Where sleeping-car revenue on an individual line is insufficient to meet its agreed share of Pullman operating expenses, an element of pooling is present because of the fact that the payment of its deficiency under its guaranty would be a deduction from its operating income derived from all traffic, freight as well as passenger, presumably to be accounted for as a debit to its income account, and therefore a portion of its net earnings would be pooled with contributions from other railroads similarly situated for the purpose of meeting the expenses of the joint sleeping-car enterprise.

In a general way the relations between the railroads and Pullman, at least with respect to net revenue from sleeping-car traffic, would be similar to those between the railroads and the Railway Express Agency, Inc., which the Commission has recognized as a pooling agreement, *Railway Exp. Agency, Inc., Pooling Application,* 227 I.C.C. 517. As will be shown later in this report, there is strong competition for the transportation of passengers in sleeping cars, and the situation here is not the same as that presented in *Application for Approval of Agreement Between Pullman Co. and the Canadian National Ry. Co.,* 259 I.C.C. 41, in which division 3 found that there was no competition between the parties to that application and that accordingly it was without jurisdiction under section 5(1). In the past the Commission has regarded this provision as imposing a duty on it to pass upon agreements of this kind whenever a possibility of undue restraint of competition was disclosed, and it has therefore interpreted the provision broadly instead of narrowly, *Express Contract, 1920,* 59 I.C.C. 518, 522.

A pooling of earnings or a portion thereof is sufficient to raise a question under section 5(1). Applicants make the further contention that there would also be a pooling of service similar to that considered in *Minnesota-Atlantic Transit Co. and Nicholson-Universal S. S. Co. Pooling*, 247 I.C.C. 319. We do not see the similarity, but the point is of little importance. When section 5(1) was rewritten by Congress in 1940, it was broadened to embrace "pooling *or* division of traffic, *or* of service, *or* of gross *or* net earnings *or* of any portion thereof." (Emphasis supplied.) This repetition of the word *or* is significant and serves to negative the assertion of one of the interveners that "a pooling or division of both traffic and revenues is the only kind of arrangement that would fall within the prohibition of the statute."

If the proposal is one for a pooling of earnings, as we consider it to be, the question then arises whether the Commission would be warranted in declining to pass upon it under section 5(1), as the interveners contend. The application is one for a license as defined in the recently-enacted Administrative Procedure Act and should be disposed of in accordance with the requirements of that act.[3]

The Department of Justice filed a motion to dismiss the application, concurred in by the other interveners, in which it stated among other things:

> The power of the Commission to approve or authorize the acquisition by applicants of the stock of The Pullman Company is found only in Section 5(2) of the Interstate Commerce Act, and the Commission is without power to approve said acquisition under Section 5(1), which relates only to pooling and division of traffic or earnings.

---

[3] The applicable provision is Section 9(b), "LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. • • •"

> The application is made under Section 5(1) of th Act, and not under Section 5(2). Applicants state tha approval by the Commission of their acquisition of th stock of The Pullman Company is necessary to the op eration of the pooling arrangement, and that unles the approval of such acquisition is granted, approva of the pooling arrangements would be meaningless. Ye there is no power in the Commission to give such ap proval under Section 5(1), and no proper notice ha been given of any application under Section 5(2).

Applicants and the interveners agree that the applicatio raises no issue under section 5(2). The interveners appea to be unwilling to commit themselves on the questio whether action by the Commission under the latter sectio approving the acquisition of the Pullman stock is necessary Applicants say that it is not, and there is ample authorit for that view. Determination of the question involves a interpretation of section 5(13), which reads as follows:

> As used in paragraphs (2) to (12), inclusive, th term "carrier" means a carrier by railroad and an ex press company, subject to this part; a motor carrie subject to part II; and a water carrier subject to pa III.

This wording is similar to that of section 20a(1), a follows:

> That as used in this section the term "carrier" mean a common carrier by railroad (except a street, subu ban, or interurban electric railway which is not ope ated as a part of a general steam railroad system o transportation) which is subject to this part, or an corporation organized for the purpose of engagin in transportation by railroad subject to this part.

A sleeping-car company is not a "common carrier b railroad" within the meaning of those words in sectio 20a(1), *Interlocking Directorate Application of Richard K Mellon*, 199 I.C.C. 521. It could therefore scarcely be co sidered a "carrier by railroad" in interpreting sectio

5(13). This view is further supported by the legislative history of the Transportation Act of 1940, which shaped the present form of this paragraph.[4]

The interveners express concern over the possibility that the Commission may make some finding which directly or indirectly would purport to approve applicants' acquisition of the Pullman stock. On this point the Department of Justice says:

> Since such acquisition and control is an essential and necessary prerequisite to any pooling arrangements, and since the acquisition and control is an integral and inextricable part of the proposal made by the applicants, it would be impossible for the Commission, under the application and upon the basis of the evidence presented in support thereof, to separate or segregate from the proposal any pooling arrangements falling within the purview of Section 5(1).

We do not believe that the Commission could properly circumscribe its duty under section 5(1) by accepting this view. That duty is to express its opinion after hearing concerning "pooling or division of traffic, etc." If it makes the findings specified in the statute, the effect is to enable the applicant carriers lawfully to enter into a contract, agreement, or combination for such pooling or division. At the hearing the applicants stated that they regarded the purchase of the stock as "an integral part of the memorandum agreement that is before the Commission for consideration." Elaborating this theory in their brief, they say:

> The pooling of applicants' sleeping car business, authority for which is sought in the application, is dependent upon the acquisition by applicants of the Pullman stock, since that is the primary step in the series of measures whereby the pooling arrangement will be created. * * * Approval of the pooling transaction as

[4] See *Omnibus Transportation Legislation—Letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, * * *, dated January 29, 1940.* House Committee Print (76th Congress 3d Session), pp. 64, 69.

> sought in the application will necessarily carry with it approval of all essential parts of the transaction, including the stock acquisition.

They cite section 5(11) of the Interstate Commerce Act in support of this position, which appears to have merit in view of the fact that the proposed railroad ownership of the Pullman stock would be the circumstance of outstanding importance which would make the proposed arrangement a pooling. The question requires no extended discussion here; if it is material, it is one of law, as to which the Commission's opinion would not be final. The emphasis placed on the stock acquisition by the interveners and the tenor of their arguments indicates that they perhaps look forward to further litigation on this point even though the District Court's decision approving the sale of the Pullman stock to the railroads is affirmed.

Such an indication is to be found in the following statement in the brief of Otis & Co.:

> Thus the Commission is confronted with the anomaly of a hearing conducted under section 5(1) on proposed purchase agreements and a purported pooling operation, affecting every railroad in the United States, with the issues wholly undefined, and so without a fair and reasonable opportunity for interviewers [interveners?] to prepare their evidence to meet such issues. This is one of the basic errors in the proceeding. A clarification of the issues at the opening of the hearing would have laid bare the all-important jurisdictional question involved and stripped the proceeding of all its obvious surplusage to the comparatively narrow issues under section 5(1).

The charge of error here is without justification. All of the interveners received copies of the application when it was filed, and there is no reason to believe that any of them failed to understand that it asked for approval of pooling under section 5(1). Although this particular intervener avoided use of the word "pooling" in its petition for leave to intervene, this was not true of the other two petitions of

intervention. In a letter to Assistant Attorney General Berge relating to this proceeding a month before the hearing the acting chairman of the Commission after referring to "pooling within the meaning of section 5(1) of the Interstate Commerce Act" said:

> The application requests that we issue an order approving and authorizing such pooling.

At the outset of the hearing the presiding officer said:

> It is my understanding that this proceeding is solely under section 5(1) and that no application under section 5(2) has been filed * * * as I interpret section 5(2) itself, that is not necessary.

The charge that interveners did not have a fair opportunity to prepare their evidence to meet the issue as above defined is refuted by the fact that more than 60 percent of the record consisted of their evidence, most of which was directed to that issue. Some of the discussion of the question which appears in the record could be described perhaps as "obvious surplusage," but the amount thereof was not excessive.

The Department of Justice urges that "even if the jurisdictional requirements had been met, the Commission should decline to act on the proposed transactions" until the appeal from the decision of the District Court is decided by the Supreme Court. The Department points out that the proposed sale of the Pullman stock to applicants is contingent on affirmance of the District Court's decision, and this applicants concede. The Department, however, fears that "Commission approval of applicants' proposal might be erroneously construed as permission to evade or violate court order," saying further:

> There is danger that any order which might be issued by the Commission in this matter would be subject to misconstruction and that corporations and persons involved in the proposed transaction might be misled into believing that such order would enable them to com-

> plete the proposed transactions without court approval or contrary to orders which may be issued by the court relating to the sale of The Pullman Company or its future operations.

Although the Supreme Court has referred to the railroads as being under the "fostering guardianship" of the Commission, (263 U. S. 456, 478) this relation has never been understood as including any responsibility for protecting the railroads against unsound advice on the part of their law departments.

This particular question, however, has already been considered by the Commission. In the letter from the acting chairman previously referred to, he said:

> In these circumstances, we believe it to be our duty to proceed with the application in the regular course, and not hold it in abeyance until the decision of the Supreme Court.

There is evidence in the record supporting the wisdom of so doing. It is desirable that the uncertainty concerning Pullman's future be removed as soon as possible. One of applicants' witnesses testified on this point as follows:

> Questions have arisen as to renegotiation of expiring leases at higher rental rates, questions of making necessary capital expenditures for which there had been no provision—and naturally so because the deal was expected to be consummated quickly—requests of certain railroads for additional equipment or substitute equipment, or modernization of existing equipment, matters involving the control of expenses, advertising budgets, and sale of pieces of equipment not included in the deal, lease of lightweight cars purchased by the railroads, the matter of operating parlor cars that had been purchased by certain railroads, and the interim agreements with railroads to replace contracts that had been canceled as of December 31, 1945.
>
> • • • • • • • • • •
>
> The longer this state of uncertainty continues the more involved it will get. There is also the matter of

filling positions vacated by resignation, retirement, or death. Necessarily at this time that is being left entirely to the judgment of the present Pullman management.

If the District Court's order is affirmed, valuable time will have been saved by the Commission's action in disposing of this application without awaiting the Supreme Court's decision. We believe that the Commission may properly complete this proceeding and make its decision at the earliest practicable time "with due regard to the rights or privileges of all the interested parties," as provided by the Administrative Procedure Act.

The principal questions on which findings must be made in passing upon this application are (1) whether the applicants' proposed arrangement will be in the interest of better service to the public, or economy in operation, and (2) whether it will unduly restrain competition. They will be discussed in that order.

Better Service to the Public and Economy in Operation.

The word *better* is a comparative term. The Commission must therefore determine whether the applicants' plan offers superior advantages from the standpoint of service to the public in contrast with other plans for conducting sleeping-car service. Three alternatives are suggested by the evidence: (1) Ownership and operation of their own sleeping cars by the individual railroads; (2) operation of a sleeping-car service business by more than one company as competitors; and (3) continuation of Pullman's operations under the ownership and management of promoters represented by Otis & Company in its attempt to buy the Pullman stock.

The Department of Justice apparently is the only party to this proceeding which considers either the first or the second alternative feasible or desirable. It states that one of the purposes of its antitrust suit was to bring about "competi-

tive conditions . . . under which more than one company might engage in the operation of a sleeping-car service business" and criticizes the District Court for approving a plan "which removes incentive for individual participating railroads to acquire and operate their own sleeping cars." The Department introduced no evidence bearing on these matters, however.

The chairman of the board of directors of the Chesapeake & Ohio, testifying on behalf of the railroad interveners, stated it to be his opinion that individual operation and ownership of sleeping cars "would be the worst possible way . . . the most inefficient and most uneconomical." The possibility that there might be more than one sleeping-car company, each similar in a general way to Pullman, was only briefly mentioned in the record. The witness last referred to testified that within the past 18 months he had endeavored to organize a company which would compete with Pullman but met with no encouragement from persons whom he invited to join in the venture. It may safely be concluded that the financial hazards involved in such an undertaking are insuperable at the present time and that furthermore the participation of more than one company, which the Department of Justice ostensibly favors, would not be in the interest of better service to the public or of economy in operation.

This latter conclusion is based on the evidence of both the applicants and the intervening railroads. The senior vice-president of the latter railroads, a man of nearly 50 years' railroad experience, said he thought "it would be more economical, more in the public interest if one agency operated a unified sleeping-car service, nation-wide," describing the advantages of unified operation as follows:

> An independent agency operating on a nation-wide basis would have a compelling incentive to standardize the types and designs of sleeping cars and thereby very greatly reduce the investment cost of a modern sleeping car fleet with resulting savings in carrying charges and the annual cost of maintenance. Three factors

> would contribute to the reduction in the initial cost of the equipment required by a unified service agency as compared with the cost of the equipment that would be needed by the railroads individually to take care of their individual needs. These three factors are (1) reduction in the number of units needed because of greater utilization of the individual unit, (2) reduction in the number of types of cars resulting from proper standardization of designs, and (3) reduction in cost due to purchasing in much larger quantities . . . Experience of the past few years has conclusively shown that a nation-wide pool of sleeping cars is a vital military necessity to safeguard the welfare of the nation.

Another witness for the intervening railroads pointed out the desirability of uniform equipment "so that a car originating in New York, if it broke down in Mexico, could be repaired with standard parts." Applicants' evidence furnishes numerous examples of economy due to unified operation. Maintenance of a readily available equipment pool facilitates the efficient handling of seasonal travel to summer or winter resorts and of occasional large passenger movements such as those to national conventions of outstanding importance. Operation of through sleeping-car lines involving two or more railroads is simplified. Integrated handling of rate-making functions, such as the publication of joint tariffs and ticketing arrangements, is made possible. There is a labor pool or reserve of trained workers, such as conductors and porters, capable of dealing with seasonal or abnormal traffic. Unified operation offers wider opportunity for research and experimentation, resulting in general improvement of equipment in respect of car design, riding qualities, bedding, seating, lighting, heating, water cooling, air conditioning, and other similar matters. The laundries and car-repair shops previously mentioned and also warehouses have been located at strategic points in order to meet the needs of sleeping-car operations on a number of railroad lines. They are not so located and de-

signed as to make them economical for use by individual lines. Under individual operation of sleeping cars, therefore, many new facilities of this kind would have to be built.

Pullman's executive and operating organization has been adapted to nation-wide unified functioning. For this purpose the country has been divided into seven zones, each of which is under its own superintendent. These are subdivided into 47 districts, for which there are the same number of district superintendents, and there is some further subdivision which need not be described. As an example of this operating organization, at Atlanta 42 persons handle Pullman service on eight railroads and in two railroad yards. Applicants, of course, are fully in accord with the railroad interveners as to the indispensability of unified operation of sleeping-cars during the recent war and the period of demobilization. One of their witnesses stated:

> Had it not been for the efficient distribution and utilization by the Pullman Company of all sleeping car equipment, including troop sleepers and troop kitchen cars, the railroads could not have moved the tremendous volume of military traffic that they did.

The facts which bear out this statement are a matter of common knowledge.

The record fully supports a finding that operation of the sleeping-car business by Pullman under railroad ownership will be economical and will afford better service to the public than either individual operation or division of the business among two or more sleeping-car companies. We turn to the question whether the advantages of unified operation will be impaired because of applicants' ownership of the Pullman stock, as the intervening railroads contend.

These interveners in their petition for leave to intervene assert that the ownership of Pullman should be "completely independent," but this does not mean complete independence of railroad interest. One of their witnesses expressed his belief "that some interest in the railroads is desirable in the Pullman management because they at least are close

enough to the railroad situation to get the railroad point of view." If Pullman were owned by the capitalists identified with the Otis & Co. offer, it would not be independent of the railroads, for the same witness testified that the relationship between the intervening railroads and the Otis & Co. syndicate is very close. These same interests also hold what are described as sizable blocks of stock in a number of other railroads.

The interveners' criticism of lack of independence on the part of applicants' proposed management of Pullman apparently refers to the statement by one of their witnesses that control of Pullman and the railroad since 1890 "in my opinion, is by the banking firm of J. P. Morgan & Company and a small group of affiliated bankers which include Kuhn, Loeb & Company, and such houses as the Mellon banking firm, et al.," and that that control would remain under the applicants' plan "because The Pullman Company and the railroads and the New York Central and the Pennsylvania all respond to the same voice." The record is otherwise silent as to Kuhn, Loeb & Co. Evidence concerning J. P. Morgan & Co. and the Mellon interests is discussed subsequently in the report.

The intervening railroads further fear that under the applicants' plan "the smaller railroads would be more or less at the mercy of the larger railroads." As shown by Appendix A, the Pennsylvania Railroad Company and the New York Central system together would own approximately 32 percent of the Pullman stock. The next largest share would be that of the Southern Pacific Company, 8.55 percent. The remaining 60 percent would be divided into amounts of 6 percent or less. Pullman with about 50 stockholders would be a comparatively small corporation not similar to certain other corporations referred to in this record in which a considerable degree of control can be based on minority holdings of stock in a strategic position. The interests of the stockholders would not be as investors but rather as partners in a joint enterprise closely linked with

the business of the individual stockholders. It is difficult to see any likelihood of mismanagement of the corporation for the benefit of part of the stockholders to the detriment of the others. The participating railroads must be presumed to have carefully considered the probable advantages as well as any potential disadvantages of the arrangement. If the smaller roads should have any misgivings as to possible domination by the larger ones—a hypothesis without any support in the record—they may take comfort in the following sentence from the final opinion of the District Court:

> We also know that if any one of the partners in the cooperative enterprise start to play fast and loose with one of its associates, this Court is open to a suitor who claims that our decree is not being complied with.

Under applicants' plan Pullman would have 15 directors. Six would be elected at large and nine by regions. Three would be chosen by the stockholder railroads in each of three regions, the East, Southeast, and the West. The stockholders in each of such regions would agree upon three candidates for three places on the board, and the stockholders of the other two regions would be obliged to cast their votes for the candidates so designated. Thus the stockholder railroads in the Southeast with a total of 14 percent of the stock, less than the percentage of either the New York Central or the Pennsylvania, would have the right to name three directors and the western stockholders, having 39.5 percent, would be entitled to three. These two groups, furthermore, would have a combined total of about 53 percent, which by concerted action might have dominant force in selecting the six directors at large. There is no evidence, however, pointing to the probability of such geographical cleavage.

The intervening petition of the Department of Justice contained an allegation that "railroads not members of the Railroad Buying Group would be injured and prejudiced

in securing adequate sleeping car service," but counsel for the Department stated at the hearing that "the Government is not prepared to introduce evidence, and will not seek to introduce evidence on that particular point."[5]

In addition to the Department's abandonment of this allegation it should be remembered that one of the conditions in the District Court's approval of the sale of the Pullman stock to the applicants was "That the Pullman Company or any person or corporation to whom the vendee railroads may hereafter sell Pullman's stock or assets shall offer to enter into a contract to supply, as available, excess sleeping cars, not purchased by individual railroads, upon proper terms, to such railroads as may desire such contract," and that the court has retained jurisdiction in order to enforce that condition and others, if necessary. Applicants' memorandum agreement, as amended, contains the following provisions which bear on this particular question:

> The Pullman Company will service, or to the extent that it has sleeping cars available it will furnish and service, for any railroad contracting therefor, sleeping cars owned by or leased to The Pullman Company, including cars from the pool * * *, and will service sleeping cars owned by such railroad whether leased to The Pullman Company or not.
>
> All leases, operating contracts, and other contracts provided for in this Article VI shall be on reasonable non-discriminatory terms.

There is no evidence which justifies any suspicion of a lack of good faith in the undertakings above quoted.

The railroad interveners make a specific objection to applicants' proposal on the ground that it "disregards the fundamental reason for the existence of the Pullman Company . . . the ownership and maintenance of a nation-wide pool of modern sleeping cars adequate to meet the varying

---

[5] The petition was sworn to on information and belief, but there is no suggestion that it should be given evidentiary effect for that reason.

seasonal demands and the needs for through line service." They predict that "for the next year or two the present sleeping car equipment, which is largely worn out and obsolete, would be operated in much the same way as heretofore, but as new sleeping cars gradually replace the old ones the railroads individually would own and maintain the new cars." To this charge applicants reply that under their agreement the agency which they have in mind for the period after December 31, 1948, will offer among other things: "a contract to supply, as available, excess sleeping cars, not purchased by individual railroads, upon proper terms to such railroads as may desire it, and to maintain such pool of sleeping cars to the extent required, by the acquisition if necessary of additional cars."

The intervening railroads say that the present fleet of sleeping cars should be replaced by modern equipment as rapidly as possible and that, if the Otis interests should come into control of The Pullman Company, the fleet would be replaced as speedily as the manufacturers could turn out the cars. There is a strong implication in the testimony of the Chesapeake & Ohio officials that under applicants' plan the replacement of the existing heavyweight cars would purposely be slow. Other evidence of record detracts from the force of this implication. The railroads have been interested in obtaining modern lightweight sleeping cars since 1935, but they encountered difficulties in doing so, due to their contractual relations with Pullman prior to the decision in the antitrust suit, which was beneficial, directly and indirectly, in removing those difficulties. From the present evidence also it is clear that the railroads fully recognize the desirability of modern lightweight sleeping cars. This is shown by the promptness with which they exercised their right to purchase those cars and also by their unwillingness to pay cash for the heavyweight cars which resulted in the "cash-or-car" notes. On the other hand, it must be recognized that there are important obstacles of a practical nature to any complete substitution of modern

lightweight cars for the present heavyweight cars in the immediate future. Since the cost of a new sleeping car today is $100,000 or more, and contracts of purchase contain "escalator clauses" to allow for increased wage and material costs, the replacement of 6,000 heavyweight cars would involve an outlay of $600,000,000 at least. There would thus be a financial problem in addition to the unlikelihood of securing prompt deliveries of such a large amount of new equipment under the present unsettled conditions which are retarding the output of railroad cars of all kinds. Furthermore, the heavyweight cars still have a considerable amount of utility. Although one of the witnesses for the railroad interveners described the sleeping-car plant as "in a state of collapse and practically ready to fall apart," he added:

> I am speaking now more of the riding qualities, the housekeeping features, decorations, and so forth; the air-conditioning, the springs, the lights, the toilet facilities, and things of that nature, rather than of the physical safety of the cars. That I have never questioned. The cars are strong, well built, durable, and probably will go on running another 100 years, unless something is done about it.

This statement is corroborated by testimony of one of applicants' witnesses who stated:

> A passenger car or a steel Pullman sleeping car, it should be understood, is a steel structure which must have the strength needed to meet all of the requirements of the Association of American Railroads and of the Interstate Commerce Commission safety standards. During the life of a car that strength must be maintained so that at the end of any number of years the car is sufficiently strong to meet all of the rigid requirements of the service in which it is operating. * * * The structure of a car, namely, the trucks or body portion of the car, does not become obsolete in any such period as 20 to 25 years. During that period the internal fittings are renewed several times. The electrical fixtures are changed, the upholstery is changed, and the conveniences to the public are modified or

changed in accordance with changes in taste and the traffic requirements.

As before pointed out in this report, a number of railroads, a notable example of which is the Southern Pacific, have expressed their intention of buying heavyweight cars assigned to them. The fact that applicants' plan contemplates use of the heavyweight cars, or at least some of them, until it becomes economical and feasible to replace them does not make the plan objectionable but on the contrary is one of its merits.

In our opinion the evidence shows abundantly that applicants' plan will result in better service and greater economy of operation than that which would be attained if each individual railroad were to operate its own sleeping-car service or if two or more sleeping-car companies were engaged in the business.

Restraint of Competition.

The remaining question under section 5(1) is whether applicants' pooling plan will unduly restrain competition. Since this section is part of a comprehensive statute relating to the regulation of transportation, it seems reasonably clear that the competition referred to therein is that among carriers engaged in interstate commerce. This view is supported by the extensive legislative history of the provision, as well as decisions of the Commission.

The evidence of record which bears on this question must be considered in the light of well-known facts of railroad history. Competition among the railroads for passenger traffic has always been keen and dramatic. Such part of this traffic as was formerly non-competitive, the short-haul local traffic, was largely abandoned without a struggle some 20 years ago to public and private highway vehicles, but the railroads have not relaxed their competition with each other and with the air lines for the remaining long-haul traffic.

At the beginning of the depression of the early thirties the Commission pointed out that one of the causes of the railroads' financial ills was excessive competition for passenger traffic.[6] Little, if anything, was done to reduce this competition at that time, and the improvement in economic conditions a few years later was marked by even sharper competition evidenced by the establishment of faster lightweight trains.[7] At the present time further development of this kind are in progress.

A significant circumstance in connection with this aspect of the case is the promptness with which the lightweight sleeping cars were bought by the railroads which had the right to purchase them. The New York Central and the Pennsylvania bought 138 and 142 of those cars, respectively. A total number of 281 were bought by the following western railroads: Atchison, Topeka & Santa Fe; Chicago, Burlington & Quincy; Chicago & North Western; Chicago, Rock Island & Pacific; Southern Pacific; and Union Pacific. All of these carriers are powerful rivals for some of the most

---

[6] In *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, 584, the Commission said:

> The carriers in this record pointed out the substantial curtailments of passenger service which have been made in an endeavor to reduce losses. They have also undertaken experimental service in the hope of recovering profitable patronage. But much more drastic measures will be necessary if the staggering deficit incurred by that service is to be reduced to bearable proportions. A little has been done in the pooling of competitive train service by rival lines, but we believe that the opportunities in this direction have by no means been exhausted. Much more can be done under existing law.

[7] The Commission described this development at p. 13 of its Annual Report for 1938, as follows:

> Much improvement in railroad passenger service has been made in the past few years, particularly in the air-conditioning of cars, speed, and the development of "streamlined" trains. The improvement has been more notable, however, in the field of long-haul, and particularly luxury, travel than elsewhere. The tendency is to abandon branch-line and short-haul main-line traffic to the bus and the automobile.

highly competitive passenger traffic in the country and operate modern streamlined trains which are extensively advertised.[8] Applicants' witnesses testified that there would be no restraint of competition for this passenger traffic among the railroads above-named if the proposed pooling agreement were approved, and past experience supports these statements. This competition has not been impaired by the fact that the sleeping cars used by the competitors have been manned and serviced by Pullman, and we are unable to see that the situation would be changed merely because Pullman would be owned by those competitors and other railroads. In the future as in the past each individual carrier will have a powerful incentive to attract as many passengers as possible to its trains in order to avoid deficits from its sleeping-car operations which it would have to meet under the uniform operating contract.

The Department of Justice, which, as stated in its petition of intervention "is concerned with any agreement or arrangement between such owners and operators of a sleeping car service business which restrains competition and tends to establish a monopoly," has introduced no evidence which even remotely tends to show that transportation competition among applicants or between any two of them will be restrained if earnings are pooled in accordance with the plan here proposed. Nor was any such evidence offered by the intervening railroads. Asked about the possible effect of the proposal on competition for passenger traffic between the Chesapeake & Ohio and certain of the applicants, one of their witnesses stated that he thought there would be no restraint immediately in the interim period but that there might be later "if the Pullman Company, the agency, was controlled largely by those competitors," saying further:

---

[8] Well-known examples of such competitive trains are the Twentieth Century Limited and the Broadway Limited between New York and Chicago, the Super Chief, the Chief, and the City of Los Angeles between Chicago and Los Angeles, the Denver Zephyr, the City of Denver, and the Rocky Mountain Rocket between Chicago and Denver.

> That would be—I think that would be a natural evolution. * * * Now, I don't say that would result in—I don't say that it would result in diminution of competition, but it very well might. Human nature might not resist the opportunities.

This cautious suggestion of danger, to which the witness apparently had given little or no previous thought, is not impressive. The same potential danger would, of course, be present if Pullman were controlled by persons having a very close relation to the Chesapeake & Ohio. It should also be noted that one of the competitors which the witness obviously had in mind is the Pennsylvania, which for many years had participated with the Chesapeake & Ohio in a joint sleeping-car route between New York and Cincinnati, competitive with the Pennsylvania's own single-line route between those cities.

With respect to undue restraint of competition interveners' contentions are that there would be such restraint (1) in the servicing and furnishing of sleeping cars and (2) in the manufacture of sleeping cars. These contentions were considered at length by the District Court, and it is not clear that they are material under section 5(1). However, they are presented and we shall discuss them.

The intervening railroads argue that "under applicants' plan all railroads would be stockholders, creditors and customers of The Pullman Company, the effect of which would be to create a monopoly far tighter than the present monopoly" and that "in these circumstances no new independent enterprise could possibly enter the sleeping-car business." These arguments merely repeat assertions of their witnesses which constitute most of the evidence bearing on the question. There are no facts in this record which would warrant a conclusion different from that of the District Court, expressed in the paragraph quoted in the footnote.[9]

---

[9] We see no danger of the perpetuation of monopoly in a railroad owned sleeping car business. Here we must look rather closely at

Reflecting the conditions imposed by the District Court, applicants' proposed uniform contract to be offered the individual railroads provides as follows:

> In case the Railroad shall at any time desire to furnish and operate its own sleeping cars and the usual and commissary service therein for part of its requirements, or shall desire some third party to do so, and shall request Pullman to furnish sleeping cars and the usual and commissary service therein for the remainder of the requirements of travel over the Railroad's lines, Pullman will furnish such partial service to the extent that it has sleeping cars of the required type and floor plan available therefor in its fleet of equipment and all of the terms of this contract shall be applicable to such cars.
>
> Pullman shall lease for the purpose of operation and servicing on the lines of the Railroad such new-type light-weight sleeping cars or present-type standard

---

our concept of what constitutes an unlawful monopoly in this connection. The thing which got the Pullman Company into trouble was not that it was the only company furnishing sleeping car service, but that Pullman made it virtually impossible for anybody else to get into the business. This applied not only to a competing concessionaire, but even to a railroad which sought to run part of its own sleeping car service and let Pullman do the rest. We think we have got rid of all that by the careful limitations imposed upon Pullman Company by the original judgment in this case, and which will be imposed upon its successors by the order which we shall enter. A railroad may join with others and use exclusively the services of Pullman. It may do part of that service itself, or through some other concern of its own choosing, and ask Pullman to do the rest. It may own all of its own sleeping cars, or part of them, or none of them. All of this is provided for in our judgment. There is, then, no strangle hold on the sleeping car business by a railroad owned Pullman Company or anyone else. Therefore, there is no unlawful monopoly. If there is only one store in a town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable. So here. If the railroads who are the ones responsible for providing sleeping car service can take or leave Pullman assistance to that end, there is no objection to the fact that most of them may prefer to employ the Pullman concessionaire. (64 F. Supp. 108, 112)

> sleeping cars or tourist cars owned (or held under lease) by the Railroad as the Railroad may elect, * * *

The Department of Justice urges that the reference to an election on the part of the railroads in the language above quoted is meaningless because of a sentence in the earlier memorandum agreement which reads as follows:

> Every Railroad party hereto so purchasing such (lightweight) cars shall lease the same, and any other lightweight sleeping cars which it may own or acquire during the period of the said lease, to the Pullman Company (but only for assignment for operation as authorized by such railroad) for a period to expire at the end of the interim period * * * or earlier, if so agreed by the parties.

The uniform contract would no doubt supersede the foregoing provision which seems to have been designed to take care of needs during the period of demobilization period. The District Court took note of this situation as follows:

> The proposal is that for the present all sleeping cars, whether bought by individual roads or not, shall be in the general pool. This is imperative, since the armed forces need the service, and the emergency is not yet passed.

In any event the District Court has undertaken to prevent any unlawful monopoly by Pullman in the immediate as well as the more remote future. No legal or factual grounds would support a finding in this proceeding that competition in the servicing and furnishing of sleeping cars would be restrained despite the District Court's efforts to prevent such restraint.

This is true also as to the contention that applicants' plan would result in the continuance of a restraint of trade in the manufacture of sleeping cars, which the District Court sought to remove. As shown in Appendix B, to that end the court ordered that "no person shall be at the same time a director of Pullman Inc., and of any vendee rail-

road." Shortly after the court's order Richard K. Mellon, a director of the Pennsylvania, resigned as a director of Pullman Incorporated. A few weeks earlier in anticipation of the District Court's requirement three other directors of the latter company had resigned—Harold S. Vanderbilt and George Whitney, directors of the New York Central, and Henry S. Sturgis, a director of the Erie Railroad Company. At about the same time John R. Morron, who had been a director of both Pullman Incorporated and the Baltimore & Ohio Railroad Company, resigned from the board of the last-named company. Subsequently, Vanderbilt and Whitney disposed of their holdings of Pullman Incorporated stock. Sturgis' investment in that stock is comparatively small, but Mellon has for some time held a considerable amount, which together with that owned by members of his family and other relatives and certain family trusts, amounts to 96,829 shares.[10] These constitute the largest unified holding of Pullman Incorporated stock and are approximately 3 percent of the total of 3,229,897 shares outstanding March 15, 1946.

J. P. Morgan & Co., Incorporated, is the stock transfer agent for Pullman Incorporated and has represented it in certain purchases of its stock for its treasury. Whitney is a director and the president of Morgan & Company. Since his resignation from the Pullman Incorporated board the latter has included no one connected with Morgan & Company, although D. A. Crawford, president of Pullman Incorporated, in a letter written February 1946, suggested that "a representative of the Morgan & Company group"

---

[10] The Mellon interest dates from 1930, when Pullman-Standard absorbed two car-building companies controlled by the Mellons. At one time it included nearly 432,000 shares of Pullman Incorporated stock, but it was sharply reduced in 1941 and 1942. There is no indication that the Mellon holdings of Pullman Incorporated stock are likely to be reduced still further, although recently the chairman of the board of directors of the Chesapeake & Ohio inquired of Richard K. Mellon whether a bid for the purchase of those holdings would be entertained. At present three directors of Pullman Incorporated and one member of the board of Pullman-Standard are identified with the Mellon interest.

be elected a director. The record does not show that anyone who might be included in such a group owns stock in Pullman Incorporated at this time.

The Department of Justice and the other interveners take the position that there are interlocking holdings of stock which connect certain railroad companies with Pullman Incorporated and have much the same effect as the interlocking directorates criticized by the district court. So far as the record shows, Mellon and Sturgis are the only railroad directors who themselves own stock in Pullman Incorporated. In all other instances the connection traced by the Department of Justice extends through other corporations. For example, next in size to the Mellon interest in Pullman Incorporated is a block of 45,000 shares owned or controlled by a Massachusetts investment trust, whose directors include five railroad directors residing in Boston, Mass. A number of insurance companies which own stock in Pullman Incorporated have certain men on their boards of directors who are also officials or directors of railroads. Certain other such officials and directors are directors of banks or trust companies in New York, Chicago, or Philadelphia, Pa., which administer trusts or estates whose holdings include Pullman Incorporated stock.

The District Court in its original opinion, speaking of interlocking directorates, said (50 F. Supp. 123, 133):

> The significance of such interlocking directorates is not that their existence, by themselves, constitutes a violation of the Sherman Act.

This observation would seem applicable *a fortiori* to the interlocking holdings of stock stressed by the Department of Justice in contrast to directorates. There is no evidence here which supports any suspicion that such attenuated connections as those above described redound to an unfair or unlawful advantage of Pullman-Standard in securing orders for cars. An example which standing by itself might lend a slight amount of plausibility to such suspicions is to be found in the Mellon holdings of Pullman Incorporated

stock and the Pennsylvania directorate of Richard K. Mellon. The Pennsylvania, however, has never gone out of its way to buy cars from Pullman-Standard. It now has on order 256 new passenger coaches, sleeping cars, etc., including some which will be owned jointly with other carriers. Of these 107 will be supplied by Pullman-Standard at a total cost of $10,457,140, and 149 are on order from two other companies at a combined cost of $14,153,106. In addition, the Pennsylvania is building 100 units of passenger equipment in its own shops. Between 1927 and 1946 the Pennsylvania acquired 47,497 freight cars, of which Pullman-Standard built 1,400 (about 3 percent).

The situation with respect to dealings between the New York Central and Pullman-Standard is also of interest. Between 1930 and 1946 this railroad on competitive bids bought 418 passenger cars from Pullman-Standard and its predecessor and 450 such cars from other companies. It has never bought any freight cars from Pullman-Standard. As of November 1, 1946, the New York Central had on order 353 passenger cars from Pullman-Standard and 367 from other companies.

Recently the intervening railroads themselves placed an order for 284 new units of passenger equipment with Pullman-Standard. On the theory advanced by the Department of Justice this order could be explained by the fact that Harvey D. Gibson, a director of the Chesapeake & Ohio, is also a director of the Home Insurance Company, which owns or controls 6,500 shares of Pullman Incorporated stock. Or it might be suggested that the order reflected a hope on the part of persons in control of the Chesapeake & Ohio that they might persuade the Mellons to sell them some Pullman Incorporated stock. The most reasonable inference, however, is that the sole determining factor was one of cost.

The argument that Pullman-Standard would be unlawfully favored if this application were granted is wholly inconsistent with the legislative policy expressed in the Clayton antitrust act, which by section 10 permits sales trans-

actions between corporations, even where there is a substantial interlocking of management or control, subject to competitive bidding. The District Court has reinforced this safeguard by requiring that hereafter all purchases of new sleeping cars either by Pullman or any of the applicants shall be made only after competitive bidding, as to which it said (64 F. Supp. 108, 112):

> The requirement for competitive bidding will, we think, shut off the last possibility of any untoward influence of Pullman-Standard following sleeping cars into the hands of the people who now take over.

If it should later develop that the court was mistaken in this belief, it would no doubt exercise the jurisdiction which it has retained in the antitrust suit. The evidence here, however, indicates that any such necessity is extremely unlikely.

THE PUBLIC INTEREST.

Although the Department of Justice does not make a positive contention that section 5(2) of the Interstate Commerce Act is applicable to applicant's proposal, the Department urges that there is no evidence in the record bearing on the elements set forth in section 5(2)(c) to which the Commission must give weight in passing upon transactions subject to section 5(2), as follows:

> (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Insofar as sleeping-car service involves transportation, facts are presented which would support a favorable finding on the first point. Neither upon legal nor upon other grounds does it seem necessary or appropriate to consider the other three points. The matter would require no men-

tion in this report were it not for the assertion of the Department of Justice in its brief that "insofar as the employees are concerned, the record shows an utter lack of plan with respect to, if not a complete disregard of, their position in the event the proposals are approved." The intervening railroads make a similar assertion. Such charges seem to be calculated to incite unrest among the Pullman employees, for which there is no justification.

In October 1945 the railroad buying group gave the following assurance in writing, which is reiterated in this record by the applicants:

> The Pullman Company under its railroad ownership will faithfully perform and keep the obligations and commitments to labor under outstanding agreements and practices according to the law of the land . . .

Since no change in Pullman's corporate entity or its present mode of operation is proposed, it is impossible to see how the employees would be harmed if the proposed pooling is approved. Nor does it appear that they would be any better off if Otis & Co., were to come into control of Pullman. On the other hand, if each individual railroad were to decide to operate its own service in lieu of Pullman according to one of the plans which the Department of Justice avowedly considers desirable it seems certain that a number of troublesome questions involving labor relations would arise.

The intervening railroads and Otis & Co., according to their brief, view the issues of this proceeding as being of transcendent importance. If this appraisal is correct, by no means the least important issue is the question whether, as contended by these interveners, the powers of the Federal Government shall be used to place control of Pullman in Otis & Co., rather than in the applicant railroads on the ground that this action is essential to meet the requirements of the antitrust statutes and to serve the general public interest. Otis & Co. states its claim as follows:

It should be emphasized that this proposed transaction is very different from those cases in which the lack of a practical alternative puts extreme pressure on the Commission's exercise of discretion. Otis & Co., was one of several offerors in the District Court at Philadelphia and is an appellant in the Supreme Court. Its offer to purchase The Pullman Company is a cash offer, and its proposals (a) to replace the existing obsolete pool with a fleet of modern sleeping cars, and (b) to improve sleeping car service without discrimination for all the railroads, were spread upon the record in this proceeding. Otis & Co., and those with whom it is associated in this offer, are independent of any relationships, direct or indirect, to the monopoly interests which control the sleeping car industry and which the Philadelphia Court condemned in its decision of May 8, 1944. Further, Otis & Co.'s ownership and operation of The Pullman Company would not exclude any other independent concern from the field. Thus the Commission is assured that there is no need to perpetuate a monopoly in the business of furnishing and servicing sleeping cars; that a completely independent group is ready, willing and able to enter the field to serve all the railroads.

It is assumed, of course, that the intervening railroads concur in the foregoing statement; whether the ultimate object of the Department of Justice coincides with that of the other intervenors in this respect is not wholly clear.

It may be that the Commission will not consider it necessary to pass upon the merits of the Otis & Co., offer above described, but if these are deemed to present a material issue, our opinion derived from hearing the evidence directly is that this evidence provides no factual support for the claimed superiority of that offer from the standpoint of public interest.

Proposed Findings.

The Commission should make the following findings:

1. All of the applicants have assented to the pooling of railroad earnings involved in the operation of sleeping car service as proposed in the application.

2. The proposed pooling will be in the interest of better service to the public and of economy in operation.

3. The proposed pooling will not restrain competition.

4. The consideration for the proposed pooling, as set forth in Appendix C to this report, will be just and reasonable.

Interveners' motions to dismiss the application and to clarify the issues should be denied.

The Commission should enter an order which would approve and authorize the proposed pooling.

APPENDIX A (to Examiners Report).

Carrier	Approximate Percentage of Cars Operated to Total	Participant's Approximate Share of the Purchase Price
The Pennsylvania Railroad Company	16.18	$6,502,872
The New York Central Railroad Company) The Pittsburgh and Lake Erie Railroad) Company)	15.50	6,231,425
Southern Pacific Company	8.55	3,436,910
Union Pacific Railroad Company	6.00	2,413,958
The Atchison, Topeka and Santa Fe Railway Company	5.61	2,255,600
Southern Railway Company) The Alabama Great Southern Railroad) Company) The Cincinnati, New Orleans and Texas) Pacific Railway Company) New Orleans and Northeastern Railroad) Company) Georgia Southern and Florida Railway) Company)	3.97	1,597,888
The New York, New Haven and Hartford Railroad Company (trustees)	3.54	1,422,444
The Baltimore and Ohio Railroad Company	3.41	1,372,834
Chicago and North Western Railway Company) Chicago, St. Paul, Minneapolis and Omaha) Railway Company)	3.05	1,225,734
Chicago, Burlington & Quincy Railroad Company	2.73	1,095,638
Atlantic Coast Line Railroad Company	2.41	970,247
Louisville and Nashville Railroad Company	2.25	907,290
The Chicago, Rock Island and Pacific Railway Company (trustees)	2.21	888,354
Missouri Pacific Railroad Company (trustees)	1.86	746,641
Illinois Central Railroad Company	1.79	720,147
Seaboard Air Line Railway Company (trustees)	1.74	698,639
	80.80	$32,486,621

Carrier	Approximate Percentage of Cars Operated to Total	Participant's Approximate Share of the Purchase Price
Forward	80.80	$32,486,621
Northern Pacific Railway Company	1.51	606,736
Great Northern Railway Company	1.46	587,921
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	1.29	518,130
The Chesapeake and Ohio Railway Company	1.17	470,128
St. Louis-San Francisco Railway Company (trustees)	1.15	464,821
Wabash Railroad Company	1.15	460,761
Missouri-Kansas-Texas Railroad Company	1.04	418,789
Florida East Coast Railway Company (trustees)	.81	325,077
The Texas and Pacific Railway Company	.76	307,067
The Denver and Rio Grande Western Railroad Company (trustees)	.75	302,363
Boston and Maine Railroad	.71	283,427
Lehigh Valley Railroad Company	.62	248,652
Norfolk and Western Railway Company	.61	243,547
Richmond, Fredericksburg and Potomac Railroad Company	.58	232,933
The Alton Railroad Company (trustee)	.57	227,305
The Delaware, Lackawanna and Western Railroad Company	.53	214,641
International-Great Northern Railroad Company (trustees)	.48	191,525
Central of Georgia Railway Company (trustees)	.44	175,283
Erie Railroad Company	.43	172,710
Western Pacific Railroad Company	.42	168,850
The Delaware and Hudson Railroad Corporation	.42	168,368
	97.70	$39,275,655

Carrier	Approximate Percentage of Cars Operated to Total	Participant's Approximate Share of the Purchase Price
Forward	97.70	$39,275,655
Pere Marquette Railway Company	.41	163,664
The Nashville, Chattanooga & St. Louis Railway	.38	154,780
The New York, Chicago and St. Louis Railroad Company	.32	130,417
Chicago Great Western Railway Company	.27	109,672
New Orleans, Texas & Mexico Railway Company (trustee)) The Beaumont, Sour Lake & Western Railway Company (trustee)) The St. Louis, Brownsville and Mexico Railway Company (trustee)) San Antonio, Uvalde & Gulf Railroad Company (trustee))	.24	96,968
Maine Central Railroad Company	.23	93,792
The Western Railway of Alabama) Atlanta and West Point Railroad Company)	.16	64,324
Reading Company	.08	33,730
Gulf, Mobile and Ohio Railway Company	.06	23,679
Louisiana & Arkansas Railway Company	.06	23,237
The Kansas City Southern Railway Company	.06	22,393
Bangor and Aroostook Railway Company	.03	10,171
Total	100.00	$40,202,482

APPENDIX B (to Examiner's Report).

Final Order of the District Court, entered January 4, 1946, approving the sale of the stock of Pullman Company to the Applicants (the text of this order is printed in the Record on these appeals at pp. 1203-1205).

APPENDIX C (to Examiner's Proposed Report).

Proposed Uniform Operating Contract.

* * * * *

ARTICLE IV.

Section 1 (A). Pullman shall first retain from the gross earnings from the sale of seats, berths and other accommo-

dations, and commissary operations (where conducted by Pullman) in all sleeping cars operated under the terms of this contract during each contract year an amount, so far as such gross earnings may be available, equal to the sum of the following items:

(a) The total of Pullman's "Expenses of Operations" of all cars operated on the lines of the Railroad for such contract year, with such "Expenses of Operation" determined as provided in Section 3 of this Article and with the number of cars operated determined as provided in Section 2 of this Article.

(b) An interest return on cars operated on the lines of the Railroad equivalent to (i) the Railroad's cars operated proportion of an amount equal to three (3) percent per annum on the average depreciated value, as determined and used in computing price of Pullman stock as of December 31, 1945 (adjusted to reflect subsequent additions and betterments, retirements and depreciation accruals), for all present-type heavyweight standard sleeping cars, new-type lightweight sleeping cars, tourist sleeping cars and troop sleeping cars owned by Pullman, plus (ii) an amount equal to the Railroad's cars operated percentage (for the cars leased to Pullman) of the interest rental paid to the Railroad pursuant to Section 2 of Article I of this contract, and plus (iii) the Railroad's cars operated percentage of interest rental paid each other railroad for cars of its ownership operated on the lines of the Railroad; computed for each type of car separately, with the number of cars operated determined as provided in Section 2 of this Article. The average depreciated value of Pullman-owned cars shall be ascertained, for each type of car separately, by averaging the depreciated value at the beginning of each month in the year, determined in this paragraph.

(B). If, for any contract year, the total gross earnings of all sleeping cars operated under the terms of this contract shall exceed the total amount of Pullman's "Expenses of Operation" for all cars operated, plus the interest re-

turn to Pullman provided for in paragraph (b) of Sub-Section (A) of this Section, such excess shall be divided equally between Pullman and the Railroad.

(C). If, for any contract year, the total gross earnings of all sleeping cars operated under the terms of this contract shall be less than the total amount of Pullman's "Expenses of Operation" of such cars plus the interest rental applicable to railroad-owned lightweight cars represented in amounts refered to in clauses (ii) and (iii) of paragraph (b) of Sub-Section (A) of this Section, the Railroad shall pay to Pullman the amount of the deficiency.

Section 2. The number of cars of each type described in Section 1 of Article I hereof operated during each contract year shall be determined as follows:

The aggregate number of days of actual service (which shall include actual time consumed on loaded movements, regular scheduled layover between trips and empty movements to and from service) of cars of each type and ownership shall be divided by the number of days in the contract year and the quotient shall be taken to be the average number of cars of such type continuously in service during the year.

Section 3. Except as herein otherwise provided, the term "Expenses of Operation" as used in this contract shall include all of Pullman's expenses of conducting its sleeping car business and commissary services, except the cost of maintaining and operating air conditioning apparatus, but including all taxes except income taxes, and also including but not limited to the various items elsewhere herein expressly provided to be included in "Expenses of Operation"; and that such expenses shall be ascertained separately for each of the four types of cars in accordance with the practice of Pullman in so ascertaining same at the time this contract is made, subject to such changes as may be agreed upon or as may be now or hereafter provided for in the classification of sleeping car accounts prescribed by the Interstate Commerce Commission; and the total of the expenses so ascertained separately for each type of car shall

be divided by the number of all cars of such type operated by Pullman on all railroads (ascertained as provided in Section 2 of this Article). The result so obtained, indicating average expense per car of each type shall be multiplied by the number of cars of such type (ascertained as provided in Section 2 of this Article) operated under the terms of this contract and the product shall be the total "Expenses of Operation" of the cars of such type operated under this contract. "Expenses of Operation" shall also include the amount reflecting depreciation included in rental, and taxes paid in respect to leased cars, but not interest rental paid in respect thereof, as provided in Section 2 of Article I of this contract.

For the purpose of the above computation all expenses of Pullman in connection with the operation of present-type standard sleeping cars, new-type lightweight sleeping cars, tourist sleeping cars and troop sleeping cars operated by Pullman shall be considered common to all four types of cars except depreciation, shop maintenance, and such other items of the expense as can be readily apportioned to the different types of cars (which in the case of depreciation of new-type lightweight cars leased shall be ascertained and assigned specifically to the cars of the owner railroad), and to ascertain average common expenses of operation of each type of car operated by Pullman, for purposes of contract settlement with all railroad companies, the above mentioned excepted items of expenses shall be eliminated from the total expenses of Pullman for all of the four types of cars operated during the contract year, and the total of the remaining expenses shall be divided by the total number of present-type standard sleeping cars, new-type lightweight sleeping cars, tourist sleeping cars and troop sleeping cars operated during such contract year to arrive at the average of the common expenses of all types of cars and to such average shall then be added the average of the above excepted expenses separately for each of the four types of cars, ascertained as herein provided, and the total of the average of common expenses and excepted ex-

penses for each type of car shall be multiplied by the number of cars of such type (ascertained as provided in Section 2 of this Article) to ascertain the "Expenses of Operation" for the contract year of all cars of each type operated on the lines of the Railroad.

Section 4. A statement showing the gross earnings of cars operated hereunder, and a statement of "Expenses of Operation" shall be furnished by Pullman to the Railroad as soon as practicable after the end of each contract year, and the Railroad shall have the right to verify such statements by examination of the books and accounts of Pullman.

All amounts due either party in the annual settlement of accounts hereunder, shall be paid within 30 days after statements have been furnished the Railroad at the close of each contract year.